

(b)(6)



U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship
and Immigration
Services

Date: **AUG 29 2013** Office: NEBRASKA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center (the director). The appeal was summarily dismissed by the Administrative Appeals Office (AAO). The petitioner filed a motion to reopen or reconsider the AAO's decision in accordance with 8 C.F.R. § 103.5 which the AAO denied. The matter is currently before the AAO on another motion to reopen or reconsider. The motion will be granted, and the appeal will be dismissed on its merits.

United States Citizenship and Immigration Services (USCIS) regulations at 8 C.F.R. § 103.5(a)(3) state, in pertinent part, that "[a] motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy. A motion to reconsider... must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision."

The petitioner is a lady's clothing business. It seeks to employ the beneficiary permanently in the United States as a database administrator. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, which has been approved by the United States Department of Labor (DOL). Upon reviewing the petition, the director determined that the petitioner had failed to respond to the director's Request for Evidence (RFE) dated April 21, 2011; and therefore, was not able to establish that the beneficiary is qualified to perform the duties of the proffered position with a minimum of a bachelor's degree in computer science and 60 months (five years) of qualifying employment experience. The director denied the petition accordingly.

As set forth in the director's August 30, 2011 denial, the issue in this case is whether the petitioner has established that the beneficiary possessed all the education, training, and experience requirements as of the priority date as required by the labor certification.

In pertinent part, section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N Dec.158 (Acting Reg'l Comm'r 1977). The priority date of the petition is November 7, 2010, which

is the date the labor certification was accepted for processing by the DOL. See 8 C.F.R. § 204.5(d).¹ The Immigrant Petition for Alien Worker (Form I-140) was filed on December 27, 2010.

To determine whether a beneficiary is eligible for an employment based immigrant visa, United States Citizenship and Immigration Services (USCIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm'r 1986). See also, *Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

A review of the AAO's decision reveals that the AAO accurately set forth a legitimate basis for the denial. The petitioner submitted a copy of the beneficiary's Bachelor of Science in Computer Science degree issued to her by [REDACTED] in the [REDACTED] on [REDACTED] 1993. The petitioner also submitted a copy of the beneficiary's transcripts from that college. The AAO determined that this evidence was sufficient to demonstrate that the beneficiary has met the educational requirement of the labor certification, a bachelor's degree in computer science. However, the AAO determined that the petitioner had failed to establish that the beneficiary possesses all the experience requirements indicated on the labor certification, with five years of qualifying progressive employment experience in the job offered. Therefore, the remaining issue is whether the petitioner has established that the beneficiary possessed the five years of qualifying work experience as of the priority date in this matter.

On motion, the petitioner asserts that it is submitting a certificate of employment from the beneficiary's previous employer evidencing her experience in the proffered position and her qualifications to handle such position.

Evidence of qualifying experience shall be in the form of letters from former employers which include the name, address, and title of the writer and a specific description of the duties performed. If such evidence is unavailable, other documentation relating to the experience will be considered. 8 C.F.R. § 204.5(g)(1).

The beneficiary set forth her credentials on the labor certification and signed her name under a declaration that the contents of the form are true and correct under the penalty of perjury. On the section of the labor certification eliciting information of the beneficiary's work experience, she

¹ If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date is clear.

represented that she was employed by [REDACTED] as a database administrator from April 1, 1994 through December 31, 2004.

On motion, the petitioner submitted a letter of employment dated December 31, 2004, signed by a manager, administration department who stated that the beneficiary was employed by [REDACTED] as a database administrator from April 1, 1994 to December 31, 2004. The employment letter does not include the number of hours the beneficiary worked per week or the qualifying employer's address. See 8 C.F.R. § 204.5(g)(1) and (l)(3)(ii)(A). To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, is November 7, 2010. See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Hence, the petitioner has failed to establish the beneficiary's qualifications as of the priority date.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, is April 28, 2011. See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act.Reg.Comm.1977).

Accordingly, it has not been established that the beneficiary has the requisite five years of progressive experience in the job offered as required by the ETA Form 9089 or that she is qualified to perform the duties of the proffered position. 8 C.F.R § 204.5(g)(1).

A second issue is whether the petitioner has established its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. See 8 C.F.R. § 204.5(g)(2).

In determining the petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner has paid the beneficiary the full proffered wage each year from the priority date. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage.² If the petitioner's net income or net current assets is not sufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. See *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm'r 1967).

² See *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983); and *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011).

In the instant case, the proffered wage is \$33.17 per hour based upon a 40 hour work week (\$68,993.60 per year) and the priority date is November 7, 2010.

As is noted by the AAO in its previous decision, the petitioner submitted a CPA letter and a copy of its 2009 unaudited financial statements. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The accountant's report that accompanied those financial statements makes clear that they are reviewed statements, as opposed to audited statements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. Reviews are governed by the American Institute of Certified Public Accountants' Statement on Standards for Accounting and Review Services (SSARS) No.1., and accountants only express limited assurances in reviews. As the account's report makes clear, the financial statements are the representations of management and the accountant expresses no opinion pertinent to their accuracy. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

The petitioner has failed to address this issue on motion. The petitioner did not submit its corporate tax return for 2010 or any subsequent years. The petitioner did not submit any evidence to demonstrate that it employed the beneficiary. The petitioner failed to establish that factors similar to *Sonegawa* existed in the instant case, which would permit a conclusion that the petitioner had the ability to pay the proffered wage despite any shortfalls in wages paid to the beneficiary, net income and net current assets.

Accordingly, the petitioner has failed to establish its continuing ability to pay the proffered wage to the beneficiary since the priority date.

For these reasons, considered both in sum and as separate grounds for denial, the petition may not be approved. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.